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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 854

KARL STRECH,
Petitioner and Plaintiff,
vs.
THE BLISSFIELD COMMUNITY SCHOOLS DISTRICT,
a Michigan Public Corporation,
Respondent and Defendant

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that Writ of Certiorari issue to review the judgment of the Michigan Supreme Court entered in the above entitled cause on November 24, 1959, and its Order Denying a Petition For a Rehearing entered January 13, 1960.

OPINIONS BELOW

Rule 23, 1 (a)

The opinion of the Honorable Rex B. Martin, Circuit Judge in and for the County of Lenawee, State of Michigan, granting Defendant's Motion to Dismiss is attached hereto as Appendix D.

The opinion of the Michigan Supreme Court appears in 357 Mich. 620, 99 N. W. (2d) 545, a copy being attached hereto as Appendix F.

The Order of the Michigan Supreme Court denying the Petition for a Rehearing is attached hereto as Appendix H.

JURISDICTION

Rule 23, (b), i, ii, iii

(i) The instant non-diversity chancery action to set aside a condemnation award affirmed in 346 Mich. 186 was dismissed and the dismissal was affirmed in 357 Mich. 620. Petitioner plants his right to set aside the condemnation award on the grounds of fraud and bias in the condemnation jury, which even had said fraud and bias been known to Petitioner at the condemnation hearing, would not have been available to Petitioner to challenge the condemnation jury. The statutes in Michigan prescribing condemnation procedure thus deprived Petitioner of a fair and unbiased jury, depriving him of due process, Constitution of the United States, Fourteenth Amendment, Sec. 1.

(ii) Jurisdiction of this Court to issue a Writ of Certiorari is conferred by 28 U.S.C. 2101 (e) and 28 U.S.C. 1257 (3).

QUESTION PRESENTED FOR REVIEW

Rule 23, (c)

I.

PETITIONER CONTENDS THAT HE WAS DEPRIVED OF HIS REAL ESTATE CONTRARY TO DUE PROCESS BY A CONDEMNATION TRIBUNAL, THE METHOD OF SELECTION AND DISQUALIFICATIONS OF THE INDIVIDUAL MEMBERS THEREOF HE WAS PREVENTED FROM ATTACKING UNDER A COMBINATION OF STATUTES OF THE STATE OF MICHIGAN not only at the time of Impaneling the Condemnation Tribunal, but in addition, when the biases and prejudices of eight of the twelve members of the panel were discovered subsequent to the condemnation trial, Petitioner was prevented from attacking in chancery to set aside the findings of necessity and the award of damages for the taking on grounds of fraud.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Art. XIV, sec. 1:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

Constitution of the State of Michigan, 1908:

Art. II, sec. 16:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

Art. XIII, Eminent Domain:

"Sec. 1. Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law."

"Sec. 2. When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law: * * *"

Michigan Statutes:

C. L. Mich., 1948, sec. 602.139:

"The court to which any pesron shall be returned as a juror, shall excuse such juror from serving at such court, whenever it shall appear:

1. That he is exempt from serving on juries by the provisions of the preceding section; or
2. That he is a justice of the peace, or executes any other civil office, the duties of which are, at the time, inconsistent with his attendance as a juror; or
3. That he is a teacher of any school, actually employed and serving as such; or
4. When for any other reason, the interests of the public or of the individual juror, will be materially injured by such attendance, or his own health, or that of any member of his family requires his absence from such court."

C. L. Mich., 1948, secs. 340.711, 340.712, 340.714 and 340.715, being secs. 711, 712, 714 and 715 of Chapter 14, entitled "Condemnation of School Sites and Addition to School Sites," School Code of 1955:

"Sec. 711. Whenever a site for a schoolhouse or schoolhouses, agricultural sites, athletic fields and playgrounds shall be designated, determined, established or enlarged in the manner provided by law and the board shall be unable to agree with the owner or owners of such site upon the compensation to be paid therefor, or for the land to enlarge the same, or in case such board shall by reason of any imperfection in the title of said site or land to be added thereto, arising either from breaking the chain of title, tax sale, mortgages, levies or any other cause, be unable to procure a perfect, unencumbered title in fee simple to said site, or land for the enlargement thereof, the board of such district shall authorize 1 or more of its members to apply to the circuit judge, if there be one in the county, or to a circuit court commissioner of the county for a jury to ascertain and determine the just compensation to be made for the real estate required by such school district for such site, or for the enlargement thereof, and the necessity for using the same, which application shall be in writing and shall describe the real estate required by such board or by such district as accurately as is required in a conveyance of real estate: Provided, That whenever the board shall have designated, selected or established in a manner provided by law a schoolhouse site or land for the enlargement thereof, such selection, designation or establishment shall be prima facie evidence to said jury of the necessity to use the site so established. (C. L. '48, §340.711.)

"Sec. 712. It shall be the duty of the circuit judge or circuit court commissioner, upon such application being made to him, to issue a summons or

venire, directed to the sheriff or any constable of the county, commanding him to summon 18 freeholders residing in the vicinity of such site who are in nowise of kin to the owner of such real estate and not interested therein to appear before such judge or commissioner, at the time and place therein named, not less than 20 nor more than 50 days from the time of issuing such summons or venire, as a jury to ascertain and determine the just compensation to be made for the real estate required by such school district for such site, or for the enlargement thereof, and the necessity for using the same, and to notify the owner or occupant of such real estate, if he can be found in the county, of the time and place where such jury is summoned to appear, and the object for which such jury is summoned, which notice shall be served at least 10 days before the time specified in such summons or venire for the jury to appear as hereinbefore mentioned. (C. L. '48, §340.712.)

"Sec. 714. It shall be the duty of such judge or commissioner, and of the persons summoned as jurors, as hereinbefore provided, and of the sheriff or constable summoning them, to attend at the time and place specified in such summons or venire; and the officer who summoned the jury shall return such summons or venire to the officer who issued the same, with the names of the persons summoned by him as jurors, and shall certify the manner of notifying the owner or owners of such real estate, if he was found; and, if he could not be found in said county, he shall certify that fact. Either party may challenge any of the said jurors for the same causes as in civil actions. If more than 12 of said jurors in attendance shall be found qualified to serve as jurors, the officer in attendance and who issued such summons or venire for such jury shall strike from the list of jurors a number sufficient to reduce the number of jurors in attendance to 12; and, in case

less than 12 of the number so summoned as jurors shall attend, the sheriff or constable shall summon a sufficient number of freeholders to make up the number of 12; and the officer issuing the summons or venire for such jury may issue an attachment for any person summoned as a juror who shall fail to attend, and may enforce obedience to such summons, venire or attachment, as courts of record or justices' courts are authorized to do in civil cases. (C. L. '48, §340.714.)

"Sec. 715. The 12 persons selected as the jury shall be duly sworn by the judge or commissioner in attendance, faithfully and impartially to inquire, ascertain and determine the just compensation to be made for the real estate required by such school district for such site, or for the enlargement thereof, and the necessity for using the same in the manner proposed by such school districts; and the persons thus sworn shall constitute the jury in such case. Subpoenas for witnesses may be issued and their attendance compelled by the circuit judge or commissioner in the same manner as may be done by the circuit court or by a justices' court in civil cases. The jury may visit and examine the premises and from such examination and such other evidences as may be presented before them shall ascertain and determine the necessity for using such real estate in the manner and for the purpose proposed by such school district and the just compensation to be made therefor; and if such jury shall find that it is necessary that such real estate shall be used in the manner or for the purpose proposed by such school district, they shall sign a certificate in writing stating that it is necessary that said real estate, describing it, shall be used as a site for a schoolhouse for such district, or to enlarge its existing site; also stating the sum to be paid by such school district as the just compensation for the same. The said circuit judge or circuit court commissioner shall sign and attach to, and endorse upon the certificate thus subscribed

by the said jurors, a certificate stating the time when and the place where the said jury assembled, that they were by him duly sworn as herein required, and that they subscribed such certificate. He shall also state in such certificate who appeared for the respective parties on such hearing and inquiry, and shall deliver such certificate to any member of the board of such school district." (C. L. '48, §340.715.)

C. L. Mich., 1948, sec. 691.402:

"Juries for condemnation cases • • • in the circuit courts for this State may upon order of the court be selected and impaneled from the freeholders summoned to serve as petit jurors at that time of the court having jurisdiction over such proceedings, in the same manner as petit jurors are selected and impaneled in civil cases in the circuit court, in lieu of being selected and impaneled in the manner prescribed in the provisions of the Statute under which said proceedings were instituted. In all cases where freeholders are required to be indicated by Section of this Act, only jurors so indicated to be freeholders shall be called and sworn in the selection and impaneling of condemnation and grade separation juries."

STATEMENT OF THE CASE

May 9, 1925, Petitioner, (hereinafter designated as "Strech"), purchased on a land contract 5 acres located in the Village of Blissfield, Lenawee County, Michigan.

January 30, 1926, Strech paid the balance due and received a deed conveying title to him in fee.

September 6, 1955, Respondent, the Blissfield Community Schools District, (hereinafter referred to as the "District"), filed its Petition in the Lenawee Circuit Court in eminent

domain for the purpose of condemning the 5 acres owned by Strech.

September 6, 1955, the Lenawee Circuit Court Judge signed an Order setting the hearing on the District's Condemnation Petition for October 4, 1955.

September 10, 1955, the Circuit Judge signed a "*Venire Facias*" directed to the Lenawee County Sheriff, directing him to "summon 18 freeholders, residing in the vicinity of the Village of Blissfield * * *"

September 13, 1955, Strech was served in the City of Detroit by a Wayne County Deputy Sheriff.

October 4, 1955, the condemnation case was set for trial. Strech appeared in Pro Per. The condemnation trial started that day.

A condemnation trial in the Michigan State courts consists of 12 freeholders who are the "judges of the law as well as of the facts." During the condemnation trial no judge is present. Hence, the reference in this petition for certiorari to a "condemnation tribunal."

The method of selection of the condemnation tribunal, as disclosed in the documents on file in the Lenawee Circuit Court and from the transcript of testimony given at the condemnation trial, discloses the following:

1. The Circuit Judge called the roll of jurors. He asked for the original order drawn by the sheriff's department.

The attorney for the School District stated to the Court:

> "Well, the only thing, your Honor, the sheriff's department did was to call *me* by phone and *give me the names of the jurors that I was to contact.* He didn't send me any written communication or document." (Emphasis supplied.)

The *attorney* for the District (not the sheriff) mailed out the summons to the jurors and the registered mail, return receipt cards were returned to the office of the attorney for the School District and not to the sheriff's department.

The present attorney for Petitioner herein wrote to the Sheriff of Lenawee County as follows:

"June 10, 1958

Sheriff of Lenawee County
Adrian, Michigan

Re: In the Matter of the Blissfield Community Schools District vs. Strech

Dear Sir:

September 10, 1955, the Honorable Rex Martin, Circuit Judge, issued a venire facias, requesting that the then Sheriff of Lenawee County summon eighteen freeholders for jury duty in the above captioned condemnation case. The statute pursuant to which the proceedings were brought does not contain specific directions to the Sheriff as to what method he may employ to select these eighteen freeholders.

Do your records contain any notation as to the method used by your predecessor in office in selecting the eighteen freeholders that were selected? Perhaps the matter was delegated to one of the clerks or deputies in the office at that time.

Your co-operation in answering this vital question pertaining to this very difficult litigation is appreciated.

Very truly yours,

/s/ Robert E. Childs

REC:BK"

An answer was received from the present Sheriff of Lenawee County, Robert C. Stites, (Sheriff Wade Willett since having died), a true copy of said answer being now presented:

"SHERIFF'S OFFICE
405 North Winter Street
Lenawee County
Adrian, Michigan

Sheriff
Robert C. Stites

Under Sheriff
Claude W. Lossing

Phone: COlfax 5-2125

June 16, 1958

Mr. Robert E. Childs
Attorney at Law
Detroit 26, Michigan

Re: *Blissfied Community Schools v. Strech*

Dear Sir:

Regards to your letter dated June 10, 1958, I have checked, and I am unable to find any information relative to the drawing of the eighteen freeholders in the Blissfield Community School District v. Strech. I contacted the Judge and he states that he instructed the former Sheriff, (Mr. Wade Willett) as to the law governing the drawing of freeholders.

Hoping that this information is sufficient.

Sincerely yours,

Robert C. Stites, Sheriff
/s/ Robert C. Stites"

The balance of the *voir dire* showing the method of determining the qualifications of the members of the condemnation tribunal is set forth as Exhibit 1 of Petitioner's Bill of Complaint, Appendix B, attached to the instant Petition for Certiorari.

October 5, 1955, the condemnation jury made its award.

October 25, 1955, a Motion for a New Trial was filed on behalf of Strech by attorney James H. Baker, now deceased. November 15, 1955, an Amended Motion for a New Trial was filed.

November 25, 1955, the Lenawee Circuit Judge filed his Opinion denying the new trial.

December 1, 1955, the Judgment was entered denying the Motion for a New Trial.

June 28, 1956, the Michigan Supreme Court filed its Opinion affirming the condemnation award, which Opinion is reported in 346 Mich. 186 (Appendix A).

March 28, 1958, Strech filed in chancery his Bill of Complaint being an attack for the purpose of setting aside said condemnation award, alleging therein that because of the interest, prejudice and bias of the jurors and because of the peculiar method of selection, which interest, prejudice and bias first came to his attention after the time for filing a Petition had expired for a Rehearing in the Michigan Supreme Court, that he was deprived of his 5 acres *contra* to due process.

This Bill of Complaint (Appendix B) expressly alleges that:

1. Strech was deprived of his property *contra* to due process as is required by the United States Constitution, Fifth Amendment, 14th Amendment and Michigan State Constitution, Article II, Section 16;

2. Strech was deprived of his 5 acres in a manner not contemplated by Article XIII, Sections 1 and 2 of the Michigan Constitution, because the "jury of 12 freeholders residing in the vicinity of such property" were biased, prejudiced and chosen in a manner which is fraudulent and that a fraud was perpetrated upon Strech;

3. The bias, interest and prejudice of these 12 freeholders who acted not only as jurors but also as judges of the law were not known to Strech at the time of the commencement of the condemnation trial nor at the time counsel filed a Motion for a New Trial nor at the time the oral and written arguments were submitted to the Michigan Supreme Court;

4. A fraud was perpetrated upon Strech and he was deprived fraudulently of his 5 acres by the method of selection of these jurors and judges which was not known to Strech, but was discovered by him after the time for filing his Petition for a Rehearing before the Michigan Supreme Court had expired.

April 19, 1958, the District filed its Motion to Dismiss (Appendix C). This Motion to Dismiss therefore admitted these material facts which are stated in the plaintiff's verified Bill of Complaint:

> "14. The home of one of the jurors borders upon the school site. No street or road is between his home and the school. The school in effect, is located immediately to the rear of Plaintiff's rear lot line fence.
>
> Another juror at that time lived, and still does live, three doors south of the home of the attorney for the school district.
>
> Another juror at that time lived, and still does live, directly across the street from the home of the attorney for the school district.

Another juror at that time lived, and still does live directly across the street from the home of the superintendent of the Blissfield Community Schools District.

The superintendent of schools was the first witness in the condemnation case and was one of the key witnesses at said trial.

Every one of these five jurors above mentioned lived within four blocks of the five acres sought to be condemned.

Petitioner has made a thorough and complete investigation of these facts. It is unbelievable that these people could be fair or unbiased or have an objective viewpoint on the issue of necessity and of value. Obviously, this public improvement would have a direct influence on the value of all these jurors' homes, particularly that home of the juror which is contiguous to the real estate which has become a part of the total school site.

15. The above quoted Section 712 of the School Code of 1955 also requires that the jurors not be interested therein. Another member of the jury was related to the wife of a landowner who desired to, and did, sell his ten acres to the school district, without condemnation proceedings. It is believed that his sale would not have been consummated unless Plaintiff's five acres were condemned.

16. It is believed that another member of the jury was the client of the attorney for the school district at the time of the condemnation trial.

17. Another member of the jury was at the time of the condemnation action, the *Village Clerk* for Blissfield. Another member of the jury was the wife of a *member of the Blissfield Village Council* during the time that she served on the jury.

The sentiment in favor of the site being condemned was so high that any office holder, or rela-

tive thereof, would have felt an absolute necessity to vote in favor of condemnation.

18. Another juror lives only across the street from another piece of real estate owned by this respondent and Plaintiff herein. This juror several times attempted to purchase Plaintiff's real estate (not the subject matter of this litigation) but at no time has succeeded in doing so. It is believed that this juror was the instigator of a proceeding brought in the Lenawee Circuit several years ago against the present Plaintiff to have that real estate condemned by the State Fire Marshal as being unsafe and that the said proceedings resulted in a judgment favorable to Plaintiff herein."

The Lenawee County Circuit Judge, the Honorable Rex B. Martin, signed and filed an opinion granting respondent School District's Motion to Dismiss (Appendix D).

The decree was entered in accordance with the opinion (Appendix E), a Claim of Appeal was filed in the Michigan Supreme Court, written briefs and oral argument followed, with an opinion of the Michigan Supreme Court affirming the granting of the Motion to Dismiss (Appendix F). 357 Mich. 620.

A Petition for a Rehearing was filed by the present Petitioner (Appendix G) and an order without opinion was entered by the Michigan Supreme Court denying Petitioner's Application for a Rehearing (Appendix H).

It has been subsequently discovered that despite the Village Clerk for Blissfield and a member of the jury being the wife of a member of the Blissfield Village Council, that the 28th Annual Directory of Michigan Municipal Officials for 1955-56, printed by the Michigan Municipal League, disclosed that on page 7 thereof that the Village of Blissfield's attorney was also the attorney for the District.

PORTIONS OF RECORD INDICATING TIME AND PLACE WHERE FEDERAL QUESTIONS WERE RAISED

Rule 23.1, (f)

Bill of Complaint, Appendix B, Paragraphs 10, 11, 13, 14 and 21. Opinion of Circuit Judge Rex B. Martin, Appendix D, paragraphs 7, 8, 9, 10, 12, 14, 17, 18 and 19. Opinion of Michigan Supreme Court, 357 Mich. 620. Appendix F. Petition for Rehearing in Michigan Supreme Court, Appendix G.

REASONS FOR GRANTING WRIT

Petitioner Strech raised the issue that a condemnation tribunal functioning in the State of Michigan, whether it be designated a "special tribunal" differing from a "common law jury", *McDuffee v. Fellows*, 157 Mich. 664, 668 (1909) or that a condemnation tribunal is a "common law jury" *Wixom v. Bixby*, 127 Mich. 479, 484 (1901) must be selected and its members be free from bias and prejudice in accordance with the due process clause of the United States Constitution, Art. XIV, sec. 1.

The due process requirements are of the greatest importance when viewed within the Michigan Supreme Court's case-law, not based upon State Constitutional or Statutory requirements, that a condemnation jury is the "judge of law and fact" in condemnation cases. *Toledo, Ann Arbor and Grand Trunk Ry. v. Dunlap*, 47 Mich. 456 (1882); *Chamberlin v. Brown*, 2 Doug. (Mich.) 120 (1845);

The District's Motion To Dismiss admitted these facts:

1. The peculiar method of selection of the judge-jury panel:

A. The District filed its Petition to Condemn;

B. The Circuit Judge issued a "*venire facias*" to the Sheriff of the County;

C. The Sheriff of the County "telephoned the attorney for the school district and gave him the names";

D. The attorney for the school district sent out the subpoenas and the return receipts were mailed back to the office of the attorney for the school district—not to the Sheriff's Office.

E. There is no record in the Sheriff's Office of the method used in selecting the persons subpoenaed to serve on this judge-jury tribunal.

2. The biases and prejudices of nine of the twelve judges-jurors:

A. Judge-Juror One's home was adjacent to the school site, not even being separated therefrom by a street or alley, but only by the home-owner's back-yard fence;

B. Judge-Juror Two lived three doors South of the home of the attorney for the School District;

C. Judge-Juror Three lived directly across the street from the home of the attorney for the School District;

D. Judge-Juror Four lived across the street from the home of the District's Superintendent of Schools, the latter being the first and key witness at the condemnation hearing;

E. Judge-Juror Five was the Village Clerk;

F. Judge-Juror Six was the wife of a member of the Blissfield Village Council;

G. Judge-Juror Seven was a private client of the attorney for the School District.

It was just recently learned that the Village Attorney, who represents the Village Council and Village Clerk, was also the attorney for the School District in the condemnation proceedings.

H. Judge-Juror Eight was related to the wife of a landowner who desired to, and did, sell his contiguous ten acres to the school district without condemnation, which sale would not have been consummated unless Strech's five acres had been condemned successfully by the District;

I. Judge-Juror Nine lived across the street from another piece of real estate owned by Strech. He attempted to purchase Strech's real estate (not involved in the condemnation proceedings) but at no time had succeeded in doing so. This same Judge-Juror Nine was the instigator of a proceeding brought against Strech in the Lenawee Circuit several years ago against Strech to have that real estate condemned by the State Fire Marshal as being unsafe, which proceedings resulted in a judgment favorable to Strech.

Had the chancery case proceeded to trial on the merits, petitioner's counsel has been informed that it would have been proved that Strech did not know the facts as to Judge-Jurors One, through Eight, inclusive at the time of the condemnation trial or at the time of the hearing in the Michigan Supreme Court.

The only defense as to these admitted biases and prejudices and peculiar method of selecting these combined judges-jurors was "*res adjudicata.*" The Lenawee Circuit Judge stated that the "matter had been decided." The Michigan Supreme Court ruled that these issues could have been raised on the appeal in the Condemnation Case, and whether they were or not, the doctrine of "*res adjudicata*" applied.

Petitioner contends that even had the biases and prejudices of nine of the twelve judges-jurors been presented to the Circuit Judge on the *voir dire*, that these nine individuals would not have been excused because the condemnation procedure as established in the State of Michigan protects only the condemning authority, and not the land owner, thereby resulting in depriving Streeh of his real estate without due process as required by the United States Constitution, the Fifth and Fourteenth Amendments thereto.

1. Streeh did raise the issue as to Judge-Juror Nine, but the Circuit Judge refused to dismiss this juror because it was not within the "challenges for cause" within the statute defining challenges for cause.

2. Assuming the matter to be *res adjudicata*, nevertheless, the other disqualifications of the other judges-jurors subsequently discovered shows such partiality, biases and interests which are not *res adjudicata*, to vitiate the entire personnel of this condemnation tribunal.

IT IS NOT POSSIBLE FOR A LAND-OWNER IN A MICHIGAN CONDEMNATION CASE TO ELIMINATE THESE PARTIAL, BIASED, INTERESTED, JURORS-JUDGES FROM A CONDEMNATION TRIBUNAL, EVEN ASSUMING THE LAND-OWNER HAD KNOWLEDGE AT THE TIME OF THE *VOIR DIRE*

AS TO THESE BIASES, INTERESTS AND PREJUDICES.

3. *No peremptory challenges are permitted.*

C. L. Mich., 1948, sec. 714, Ch. 14, School Code of 1955 states:

> "Either party may challenge any of the said jurors for the same *causes* as in civil actions."

Hence, reference must be made to the statute which specifies challenges for *cause*.

4. Challenges for cause are permitted as set forth in C. L. Mich., 1948, Sec. 602.139, which reads:

> "The court to which any person shall be returned as a juror, shall excuse such juror from serving at such court, whenever it shall appear:
>
> 1. That he is exempt from serving on juries by the provisions of the preceding section; or
> 2. That he is a *justice of the peace*, or executes any other civil office, the duties of which are, at the time, inconsistent with his attendance as a juror; or
> 3. That he is a teacher of any school, actually employed and serving as such; or
> 4. When for any other reason, the interests of the public or of the individual juror, will be materially injured by such attendance, or his own health, or that of any member of his family requires his absence from such court."

5. The qualifications of these combined jurors and judges are set forth in C. L. Mich. 1948, Sec. 712, School Code of 1955, which reads:

> "18 *freeholders*, residing in the vicinity of such site *who are in nowise of kin to the owner of such*

real estate and *not interested* therein to appear before such judge or commissioner * * *."

No protection is afforded the defendant land owner under these statutes for these reasons:

A. No peremptories are permitted. No peremptory was was granted even though the defendant, Karl Streeh, did request that Judge-Juror Nine be excused.

B. Not one of the permitted statutory challenges for cause encompass the admitted disqualifying interests of these jurors:

(1) The School Code in Sec. 712 protects the School District, the condemning authority; it insures that no juror is related to the landowner and that no juror has a title interest in the real estate to be condemned.

(2) C. L. Mich. 1948, Sec. 602.139, *supra*, sets forth the challenges for cause, which insure that a public officer will not be required to abstain from his official duties because of jury service; that the interests of his own health or that of his family will require his absence from court.

Hence, with no peremptories available or being permissible, with the School Code requiring that the juror-judge must not be related to the land-owner nor may he have a title interest in the real estate to be condemned, and with the statutory challenges for cause limited to previous jury duty, or when the interest of the public or the interest of the individual juror or health of any member of his family is involved, EVEN HAD THE FACTS BEEN KNOWN TO STRECH IT WOULD NOT HAVE BEEN POSSIBLE FOR THESE OBVIOUSLY BIASED AND PREJUDICED JURORS-JUDGES TO HAVE BEEN

REMOVED FROM THE COMBINED JURY-BOX AND BENCH. After all, the owners of real estate are entitled to the protection of due process as well as are public corporations.

No better example of Strech's present contention is found than the reasoning of Mr. Justice Jackson's dissenting opinion, concurred in by Justices Frankfurter, Douglas and Murphy in *Frazier v. United States*, 335 U. S. 497, 514-520 (1948). Defendant was convicted for violating the Harrison Narcotics Act in a jury trial in a U. S. District Court for the District of Columbia. Defense counsel pointed out that the entire jury panel was composed of government employees, and that 2 of them were connected with the Treasury Department which, in effect, was the complainant against defendant, since the Treasury Department has the duty of investigating and prosecuting Federal criminal narcotic cases. Mr. Justice Jackson said:

> "On one proposition I should expect trial lawyers to be nearly unanimous: that a jury, every member of which is in the hire of one of the litigants, lacks something of being an impartial jury. A system which has produced such an objectionable result and always tends to repeat it, should, in my opinion, be disapproved by this Court in exercise of its supervisory power over federal courts."
>
> • • • • •
>
> "Because this semblance of partiality reflects on the courts, even if it does not prejudice the defendant in a particular case, I am not disposed to labor the argument as to whether counsel for this defendant did all that he might or should have done by way of objection. He did protest as soon as it was apparent what was happening to him, and that seems to me sufficient in face of adverse rulings. But even if defendant's objections were belated or technically defective, I still think the court deserves

and should require a more neutral jury for its own appearances, even if defendant does not deserve and cannot demand one.

"The cause of overloading this jury with persons beholden to the Government is no mystery and no accident. It is due to a defect in a system which will continue to operate in the same direction so long as the same practice is followed."

* * * * *

"The learned Trial Judge * * * blamed the situation on 'chance'. *But the fickle goddess is hardly to be blamed for the result when it can be seen that the cards were stacked from the beginning.* This was plainly the case when we contrast unequal advantages which the two parties could get from their equal numbers of challenges."

* * * * *

"The short of the thing is: in no case where the court has intervened to use its supervisory power to revise federal jury systems has there been any result so consistently and inevitably prejudicial to one of the litigants as here, under our noses. *Ballard v. United States*, 329 U. S. 187; *Thiel v. Southern Pacific*, 328 U. S. 217; *Glasser v. United States*, 315 U. S. 60. And in cases where a strong minority of the Court has wanted to go so far as to upset a state jury system, as offensive to fundamental considerations of justice spelled out from the due process clause of the Fourteenth Amendment, there has been no such brazen unfairness in actual practice. *Moore v. New York*, 333 U. S. 565; *Fay v. New York*, 332 U. S. 261."

* * * * *

"If we admit every fact, premise, argument and conclusion stated in the Court's opinion, it still leaves this one situation unexplained and unjustified. In federal courts, over which we have supervisory power, sitting almost within a stone's throw

of where we sit, a system is in operation which has produced and is likely again and again to produce what disinterested persons are likely to regard as a packed jury. Approval of it, after all that has been written of late on the subject of juries, makes these lofty pronouncements sound a little hollow.

"I would reverse this rather insignificant conviction and end this system before it builds up into a scandalous necessity for reversal of some really significant conviction.

"Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Murphy join in this opinion."

6. *THE STATUTORY METHODS AVAILABLE TO CHOOSE CONDEMNATION JURIES.*

The Michigan School Code of 1955, Ch. 14, (C. L. Mich. 1948, Sec. 340.712) provides that the Circuit Judge shall issue a venire directed to sheriff commanding him to summon 18 freeholders residing in the vicinity of such site. This statute is nothing new because it read the same way in Sec. 3 of Ch. VIII of P. A. 1881 (Michigan), No. 164 and was re-enacted in P. A. 1927 (Michigan), No. 349, Ch. 16, Sec. 2.

The Michigan Judicature Act of 1916, being P. A. 1915, No. 314, Ch. II, sets forth in detail the method of the "return and summoning of jurors." The exact method of creating the jury list is set forth in Sec. 122 (C. L. Mich., 1948, Sec. 602.122) and Sec. 135 (C. L. Mich., 1948, Sec. 602.135) prescribes the duties of the Sheriff, in person, or by his under-sheriff, and two justices of the peace, to attend the drawing of the juries. The exact method of selecting the names from the box is set forth.

Without any amendment to the School Code, P. A. 1941, No. 270 consisting of only two sections (C. L. Mich., 1948, Secs. 691.401 and 691.402) was enacted. It is entitled:

"An Act to provide for the designation of freeholders on Circuit Court jury lists, slips and minutes in certain cases; and to provide for the selection of juries for condemnation and grade separation damage cases from freeholders selected to serve as petit jurors."

The second section of this 1941 Public Act states:

"Juries for condemnation cases * * * in the circuit courts for this State may upon order of the court be selected and impaneled from the freeholders summoned to serve as petit jurors at that time of the court having jurisdiction over such proceedings, in the same manner as petit jurors are selected and impaneled in civil cases in the circuit court, in lieu of being selected and impaneled in the manner prescribed the provisions of the Statute under which said proceedings were instituted. In all cases where freeholders are required to be indicated by Section 1 of this Act, only jurors so indicated to be freeholders shall be called and sworn in the selection and impaneling of condemnation and grade separation juries."

The regular jury panel of the Lenawee Circuit Court could have been used.

7. Certainly the wording of the School Code that the jurors must reside within the vicinity of the site to be condemned was taken in such a way that due process was violated in that they must have had preconceived prejudices, nay, even interests, in the condemnation going through. As pointed out in the Bill of Complaint, the School District consists of at least the Village of Blissfield and the four adjoining townships of Blissfield, Palmyra, Ogden and Riga, having a minimum area of 144 square miles. Yet all the jurors selected to try this condemnation case resided within an area of less than two square miles, which included

the school site and Strech's five acres. One juror has the site bordering on his backyard. Five of the jurors lived within four blocks of the five acres condemned.

Precisely, what is meant by "vicinity"? All the historical development of jury trials ably set forth in Thayer's "A Preliminary Treatise on Evidence at the Common Law" can and should be brushed aside if the requirement that "they were from the neighborhood—*de visineto*" (Thayer, p. 91) creates a pre-ordained conclusion as to necessity and assessment of damages.

No matter what "vicinity" means historically, these jurors were too close to Strech's five acres to accord him due process.

8. The method of picking and choosing these combined jurors-judges has never yet been explained and is still a mystery. The respective interests, places of residence in relation to the school-district, and in relation to the district's attorney's residence, his clientele, their relatives, their occupations, their proximity to the proposed school-site, are all circumstances pointing to a method of selection which was not by "lot" or by "chance". It points to a method of selection calculated to reach only one result and no other: These 5 acres must be condemned of necessity and the award must be based upon the price set by the school-district.

In fact, the result was so certain that the certificate to be signed by the jurors-judges did not even leave a blank for the insertion of the word "not" before "necessary".

9. This pre-ordained result must be reconciled with other basic principles:

A. Strech is entitled to have his property rights considered, not on the basis of an obstreperous land

baron but one who had a select parcel within the limits of a city, owned by him and taxes paid thereon by him for 30 years. He made generous offers to the District to sell it 20 acres in a different location for $15,000, or 42 acres in another location for $42,000, or a gift of $5,000 cash towards the purchase of any other site chosen by the District. This is a far cry from the man painted as one with a hostile attitude towards the District, or who "refused to negotiate on reasonable" terms as described in the Motion to Dismiss, or who "is a man of substantial means and property, who has had experience with condemnation proceedings and is familiar with criminal assault and battery prosecution." No matter what his personality, means or attitudes, he is entitled to an impartial tribunal.

B. These epithets come with poor grace under the circumstances of non-explanation of selection of these particular jurors and judges. To paraphrase Mr. Justice Jackson in *Frazier v. United States*, 335 U. S. 497, 514-520: these jurors lack something of being an impartial jury. This system as used in the *Streeh case* should be disapproved by the United States Supreme Court in the exercise of its supervisory power over the state courts in order to enforce due process. Because this semblance of partiality reflects on the courts, and even if Streeh's objections were belated or technically defective, the court deserves and should require a more neutral jury for its own appearances, even if Streeh did not deserve and did not demand one. The cause of overloading the jury with persons beholden to the School District is no mystery and no accident. It is due to a defect in a system which will continue to operate in the same direction so long as the same practice is followed. "But the fickle goddess is hardly to be blamed for the result when it can be seen that the cards were stacked from the beginning." This is brazen unfairness offensive to fundamental consid-

erations of justice spelled out from the due process clause of the Fourteenth Amendment.

If Strech admits every fact, premise, argument and conclusion stated, it still leaves the method of selection of these jurors-judges unexplained and unjustified. This system is in operation which has produced and is likely again and again to produce what disinteresfed persons are likely to regard as a packed jury.

10. What is more, counsel for the school district had an obligation to reveal the biases, prejudices and interests of these jurors-judges to the Circuit Judge. Obviously, not only did the attorney for the District know of their residences and their extremely close proximity to the five acres, but these facts should particularly have been stated to the Circuit Court on the *voir dire* when Strech was in court *without counsel to represent him.*

In *United States v. Brown*, United States District Court, District of Columbia, 179 Fed. Supp. 478 (December 15, 1959) United States District Judge Youngdahl granted defendant a new trial on the Court's own motion. The companion case of *United States v. Henson, et alia*, 179 Fed. Supp., 474, gives the reason for the new trial: Brown was on trial for robbery. One juror knew the defendant's mother. The defendant's mother had discussed the facts of the crime with juror Henson when juror Henson had her hair dressed at defendant's mother's beauty shop. She told her son's attorney during the trial that one of the jurors knew the facts of the case prior to the trial. At the trial; defendant's mother testified on behalf of the defendant. Nevertheless, the defendant was found guilty.

The United States attorney brought a petition to show cause why the juror and the defendant's attorney should

not be found guilty of criminal contempt for not revealing these facts to the trial judge.

District Judge Youngdahl held the juror and the attorney guilty. The Court said on pages 476-477 of 179 Fed. Supp.:

> "Because the nature of the charges cuts so deeply into the heart's core of our judicial system, the Court considered a full airing of the situation to be essential to the fair administration of justice and to all concerned. Accordingly, it executed the rule to show cause."
>
> • • •
>
> "Both respondents were obligated by force of their oaths and consequent responsibilities to immediately inform the Court of the information they had obtained during the trial." • • • "We can assure the retention of this respect only if an atmosphere of unbiased and scrupulous honesty can be easily attributed to the deliberations and decision of the jury. In turn, this is possible only if we maintain a constant vigilance over the source and nature of all information imparted to our jurors.".

What makes it all the worse is that this was not an ordinary jury, with a Circuit Judge in constant attendance. Here we have not only disqualified jurors but also disqualified judges.

It is respectfully submitted that the rule of *res adjudicata* cannot enforce a judgment by a condemnation tribunal null and void from its very inception, and shut the door to a land owner under the guise of a necessity. The issue herein presents a fundamental law of fairness contemplated by the liberal application by the United States Supreme Court in considering Sec. 1 of Article XIV of the United States Constitution.

In view of the tremendous development of expressways, public authorities, elementary, high-school, junior college and university expansion, airport sites—all being acquired by eminent domain exercised by all governmental units of the State of Michigan, a definitive guide that eminent domain procedure must respect due process should be exacted. Despite the fact that the awards of condemnation tribunals in the State of Michigan in one calendar year probably exceeds the monetary awards rendered by all of the state courts in Michigan for personal injury, contract, *et alia* litigation, yet the Michigan Supreme Court has refused to enforce in the instant litigation an elementary principle of all litigation: fair play. Therefore it is respectfully submitted that this Honorable Court order, consistent with the due process requirements of Amendment XIV, that fair play must be applicable to condemnation tribunals as well as to all other state court judicial processes.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KARL STRECH,
Petitioner,

By: ROBERT E. CHILDS,
His Counsel.

APPENDIX A

OPINION OF MICHIGAN SUPREME COURT

STATE OF MICHIGAN—SUPREME COURT

In the Matter of the Blissfield Community Schools District,
Plaintiff and Appellee,
v.
Karl Strech,
Defendant and Appellant.

OPINION

(Filed June 28, 1956)

Before the Entire Bench.

Carr, J.

Plaintiff is a school district of the fourth class and as such is subject to the provisions of the school code of 1955 (PA 1955, No. 269). Part 2, chapter 14, of the statute makes provision for the condemnation of land for school sites and additions thereto. Deeming it necessary to secure additional land for the erection of school buildings, and the establishment of facilities in connection therewith, plaintiff, through its school board, negotiated with the owners of property for the purpose of obtaining approximately 40 acres for the purposes indicated. Included therein was a five acre parcel belonging to the defendant Karl Strech.

It is claimed that options were obtained on the desired property with the exception of Strech's land, and that nego-

tiations were had with him but that they were unsuccessful. Thereupon, pursuant to the statutory provisions above cited, the school board filed a petition in the circuit court of Lenawee County alleging the necessity of acquiring the land in question for school purposes, and the failure to obtain it through negotiations. It was requested that the court fix a time and place for hearing on the petition and that the subsequent statutory procedure be followed. Said petition was filed September 6, 1955, and on the same day an order was issued providing for a hearing on the 4th day of October following. Jurors were summoned, the hearing took place, and a certificate was returned by the jury declaring it necessary to take the property in question and fixing the value thereof at $1,200 per acre. A motion for a new trial was made and denied. Defendant has appealed to this Court claiming defects and irregularities in the proceedings of such nature as to render void the judgment entered on the finding of the jury.

It is conceded that the petition as originally filed did not correctly describe the property of the defendant that the school board desired to obtain. *The error being discovered, an amendment containing a correct description of defendant Strech's parcel was filed before submission of the case to the jury.* No claim is made that prejudice resulted from the error or that anyone was misled because of the incorrect description in the original petition. The certificate returned by the jury correctly described it, and recited further that the jury had viewed the premises. No claim is made that the view was not of the property actually in dispute. Defendant, testifying in his own behalf on the hearing, was asked if the description in the petition was correct, and answered, "I guess it is". He also stated: "I know where the property is. I should know, thirty years". It is claimed that a copy of the amendment correcting the

description was tendered to defendant but that he declined to receive it. In his opinion denying the motion for a new trial the circuit judge indicated that following the entry of judgment certain papers sent to defendant by registered mail were rejected. It is a fair conclusion that defendant, who acted as his own attorney on the hearing in circuit court, took a hostile attitude toward the proceedings and toward the plaintiff.

Appellant claims that the fact that the property was not correctly described in the original petition rendered the proceedings void. In considering this claim the circuit judge, in his opinion on the motion for a new trial, came to the conclusion that the amendment was "properly and timely filed". He further found that defendant was in no way prejudiced. As before noted, the proofs on the hearing related to the parcel in dispute which was correctly described in the certificate returned by the jury. Under the circumstances we are in accord with the finding of the circuit judge.

As a general proposition procedural rules and statutes relating to the amendment of pleadings are liberally construed to accomplish their purpose. In 18 AMJ p 971, it is said:

> "The rules applicable to the amendment of pleadings generally are in general recognized in condemnation proceedings. A petitioner may properly be permitted to amend the petition so as to limit the character of the easement sought to be condemned. The court may properly permit the amendment of the complaint or petition after the appraisement has been filed, to make the description of the real estate therein correspond with the description in the appraisement."

In *In re* Huron-Clinton Metropolitan Authority, 306 Mich 373, 385, the Court quoted with approval from Randolph on The Law of Eminent Domain, p 322, as follows:

> "'The petition may be amended not only in formal matters, but to rectify substantial errors and omissions. Thus, the petition may be amended by adding necessary parties, altering the location of the work, *reducing the quantity of land to be condemned*, altering the description of the property in question, and alleging that the work will be of public utility, and thereby taken out of the category of private uses.'"

In accord with the quoted statement from Randolph is the following from Lewis on Eminent Domain, 3d ed, vol 2, pp 994-996:

> "The practice of allowing amendments is one which should find favor with the courts, since it saves time and expense, both to the public and to the parties interested. We shall refer to the decisions without attempting to lay down any general rules. Amendments have been allowed so as to show that the signers were freeholders, as required by statute, by inserting the residence of the different owners, by inserting an allegation that a ditch would be conducive to health and of public utility, though essential to give jurisdiction, changing the description of a highway asked for, though on appeal, so as to conform to the way actually laid out and evidently intended to be asked for, by inserting an allegation of inability to agree, or refusal of selectment to lay out the way petitioned for, by striking out the words 'sitting as a court of chancery' in the address to the court, by increasing the amount of damages claimed, by inserting or correcting allegations as to ownership, by making the description of the property sought to be taken more definite, or otherwise perfecting or changing the description, by adding new names to the petition, by inserting the names of the

> owners of land taken, by inserting a stipulation as to the manner of constructing a railroad across the property in question. It has been held that a petition cannot be amended by inserting an allegation essential to jurisdiction, especially after it has been acted upon. But the general rule is that the power of amendment extends to jurisdictional as well as other matters. 'Such statutes,' says the court in one case, 'are rightly accorded a liberal, as distinguished from a restrictive, interpretation, and are almost uniformly held to be as applicable to the correction of errors and omissions in the statement of jurisdictional facts as to the correction of other defects.'"

In support of the statemens made in the quotations from Randolph and Lewis numerous decisions are cited. As illustrative of the position heretofore taken by this Court in the interpretation of charter and statutory provisions relating to amendments, we call attention to *In re* Brewster Street Housing Site, 291 Mich 313, and Department of Conservation v. Connor, 316 Mich 565. Counsel for appellant have cited Mathias v. Carson, Drain Commissioner, 49 Mich 465. It does not appear, however, that in said case any attempt was made to correct by amendment the defect in the original petition. The claim that the instant proceedings were void for the reason urged is not well-founded.

It is further asserted on behalf of appellant that the procedure followed in summoning the jurors was defective. Section 712 of the school code of 1955, above cited, reads as follows:

> "It shall be the duy of the circuit judge or circuit court commissioner, upon such application being made to him, to issue a summons or venire, directed to the sheriff or any constable of the county, commanding him to summon 18 freeholders residing in the vicinity of such site who are in nowise of kin to

> the owner of such real estate and not interested therein to appear before such judge or commissioner, at the time and place therein named, not less than 20 nor more than 50 days from the time of issuing such summons or venire, as a jury to ascertain and determine the just compensation to be made for the real estate required by such school district for such site, or for the enlargement thereof, and the necessity for using the same, and to notify the owner or occupant of such real estate, if he can be found in the county, of the time and place where such jury is summoned to appear, and the object for which such jury is summoned, which notice shall be served at least 10 days before the time specified in such summons or venire for the jury to appear as hereinbefore mentioned."

It appears from the record in the present case that on the filing of the petition the circuit judge issued a venire directed to the sheriff requiring the latter to summon 18 qualified jurors. It further appears that the sheriff duly prepared a list in accordance with the order of the court, but that instead of sending the notices himself he requested the attorney for the plaintiff to mail them out. This was done and the return registry cards came back, with one exception, to the office of the attorney. Subsequently proof of service was filed by the sheriff.

Apparently it is the claim of counsel that the act of the sheriff in procuring the attorney for plaintiff to perform the ministerial act of mailing resulted in a material defect. It is not shown, however, that defendant was in any way prejudiced, and the jurors who received the notices appeared in court at the time appointed. No objection was made on the hearing that any irregularity had occurred with reference to sending them out. It doubtless would have been better practice to have sent said notices from

the sheriff's office and to have requested return receipts addressed accordingly, but it cannot be said that the method of procedure followed was open to attack in the absence of any showing, or any claim, or prejudice, fraud, or mistake. Other questions raised by reference to the jurors who heard the matter are without merit and do not require discussion.

In advance of the presentation of proofs counsel for the plaintiff addressed the jury, pointing out the nature of the proceedings and the questions involved. In doing so he directed attention to a provision of the statute (section 711 of the 1955 school code) as to the effect of the designation by the school board of land desired for a schoolhouse site, said statutory provision making the designation *prima facie* evidence of necessity. The attorney further stated to the jury that plaintiff was not relying on the statute but would offer proof on the issue of necessity. This was done, and the proofs introduced tended to show as a matter of fact that the taking of defendant's property for the purpose for which it was sought would be reasonably conducive to the public welfare. The jurors were judges of the law as well as of the facts. The argument of counsel was not improper, and we think it highly improbable that any member of the jury could have been misled thereby.

At the conclusion of the proofs a form of certificate prepared by counsel for the plaintiff was delivered by the trial judge to the jury for the convenience of the latter. At the time the judge carefully explained the certificate, saying in part:

> "Now, I will say this, if you find for the school district, then this certificate is in the proper form and after you fill in the amount of money which you would give to the owners of the land, then you would sign the certificate.

"Now, if you find that there is no necessity in condemning this land, then I will suggest to you that you take the second paragraph and insert the word not.

"In other words, it says, 'The jury unanimously ascertains and determines that it is necessary that the land described as follows should be condemned.' And if you find it is not necessary you just insert, 'The jury unanimously ascertains and determines that it is not necessary,' and sign the certificate without filling in any amount, because if it is not necessary to condemn the land you don't have to go into the question of value. You understand that?"

To the question of the court the foreman of the jury answered affirmatively. Appellant says that the form of certificate, to which apparently no objection was made at the time, should have contained a blank space before the word "necessary". We think the remarks of the circuit judge were so clear and specific as to preclude the possibility of any error on the part of the jurors, or any of them, with reference to their acts in preparing and returning the certificate. The insertion suggested in the event of a failure to find necessity for the taking of the property would undoubtedly have been made if the issue had been determined in defendant's favor, and in that event no compensation would have been fixed. The directions given by the court in effect bring the situation within the purview of the holding in Michigan Central Railway Co. v. Miller, 172 Mich 201. Obviously the question in any such case is whether the jury might have been misled by the form of the certificate. In Manistee & Northeastern Railroad Company v. Smith W. Fowler, 73 Mich 217, cited by appellant, it does not appear that the jury was advised by the court as to the possible manner of altering or filling in the certificate.

Appellant complains that the jury did not allow him fair compensation for his property. However, the jurors viewed the premises, and the amount of compensation fixed was supported by testimony. The award was within the range of the proofs. Commission of Conservation v. Hane, 248 Mich 473; Department of Conservation v. Connor, supra. In view of the situation presented the Court may not properly interfere with the award.

It is suggested on behalf of appellant that the condemnation proceeding was prematurely brought, and the finding of necessity not justified, because the school district had not issued bonds, or authorized such issuance. It does not appear that this question was raised on the hearing before the jury, or otherwise in circuit court. The objection not only comes too late but in our opinion is wholly without merit. There is no showing that procuring the site will require the issuance of bonds. If the construction of buildings and other facilities does so, the qualified electors determining the matter will be informed with reference to the location.

Other questions raised by counsel in oral argument, or in their briefs, have been considered but do not require discussion. We find no substantial basis in the record for appellant's claim of material and prejudicial defects and irregularities. The judgment entered in circuit court on the certificate of the jury is affirmed. Plaintiff may have costs on this appeal.

APPENDIX B

BILL OF COMPLAINT

STATE OF MICHIGAN—In the Circuit Court for the County of Lenawee, In Chancery

Karl Strech, Plaintiff, v. The Blissfield Community Schools District, Defendant.		No.

BILL OF COMPLAINT

Plaintiff alleges that:

1. Plaintiff, Karl Strech, is a resident of the City of Detroit, Wayne County, Michigan, maintaining his legal voting residence in the Village of Blissfield, Lenawee County, State of Michigan.

2. Defendant, the Blissfield Community Schools District, is a school district organized pursuant to the Michigan School Code, being P. A. 1955, No. 269, the same statute being MSA 15.3001—15.3984. Pursuant to said school code, the Blissfield Community Schools District is designated as a School District of the Fourth Class.

3. May 9, 1925, Plaintiff purchased on a land contract, the following described five acres:

> Commencing at a point in the east line of Section Thirty-one (31) in Town Seven (7) South, Range Five (5) East, Nine hundred and eighty-two and eight-tenths (982.8) feet North of the South East

corner of said Section; Thence South Eighty-eight (88) degrees and fifty (50) minutes West parallel with the South line of said Section Seven Hundred and ninety-six and five-tenths (796.5) feet; Thence North two (2) degrees and thirty (30) Minutes West two hundred and seventy-two and five-tenths (272.5) feet; Thence North eighty-eight (88) degrees and fifty (50) minutes East eight hundred and two and five-tenths (802.5) feet to the East line of said Section; Thence South One (1) degree and thirty (30) minutes East along said line two hundred and seventy-two and five-tenths (272.5) feet to the place of beginning.

Plaintiff paid the balance in full and received a deed therefor, dated January 30, 1926, which deed was recorded February 20, 1934, in Liber 3290, Deeds, page 148, in the office of the Register of Deeds in and for Lenawee County, State of Michigan.

Plaintiff, as the owner in fee of said above described premises, retained said acreage without any incumbrances upon his title until September 6, 1955.

4. September 6, 1955, the Blissfield Community Schools District, present Defendant herein, filed its petition in eminent domain naming present plaintiff, Karl Streeh, as one of the respondents therein, for the purpose of condemning five acres, which petition was filed in the Circuit Court for the County of Lenawee, State of Michigan. Reference to said Circuit Court file discloses that said petition to condemn five acres purportedly belonging to Plaintiff were described as follows:

"The south half of the following described land, to-wit: Commencing at a point in the east line of Section 31 aforesaid (431.3) feet north from southeast corner of the same; thence south 89 degrees 39' west parallel with south line of said Section (782½)

feet; Thence north 2½ degrees west (551.5) feet: thence north 89 degrees 32' east (796.5) feet to east line of Section 31; thence south 1 degree east, along said line (551.5) feet to place to beginning, containing in said one half of said description five (5) acres of land more or less."

On the same day the petition to condemn was filed, an order was filed by the Circuit Judge, setting the hearing on the condemnation petition for October 4, 1955. The order for the hearing described the same real estate set forth in the petition to condemn (which is not the same real estate as owned by Plaintiff, Karl Streeh) but said order did order personal service upon Karl Streeh at least ten days previous to October 4, 1955.

September 10, 1955, the Circuit Judge signed a "Venire facias" directed to the sheriff of Lenawee County, directing said sheriff "to summon eighteen freeholders, residing in the vicinity of the Village of Blissfield, who are in no wise of kin to Karl Streeh and Charles Berry, and who are disinterested persons who reside in said County, * * *." As of January 27, 1956, this Venire facias had not as yet been filed with the Clerk of the Lenawee County Circuit Court.

October 4, 1955, the sheriff of Lenawee County filed his proof of service, summoning eighteen freeholders. The method in which he ascertained which eighteen freeholders to summon is not known to this Plaintiff. Page 5 of the transcript of testimony as typed out by the court reporter discloses the following in part:

The Court (to attorney for the school board): "Do you have the original order drawn by the sheriff's department?

Attorney: "Well, the only thing, your Honor, the sheriff's department did was to call me by phone and give me the names of the jurors that I was to contact. He didn't send me any wriften communication or document."

The "Proof of Service" has attached thereto return receipts, mailed from Blissfield, Michigan, under date of September 28, 1955, returnable to the attorney for the school district, which school district is defendant herein, and not returnable to the Sheriff of Lenawee County.

5. Plaintiff, Karl Strech, as respondent in said condemnation case, was served by a Deputy Sheriff of Wayne County in the City of Detroit, said Deputy Sheriff being a member of the sheriff's department in and for Wayne County, which service was made 21 days and less than 30 days prior to the hearing, namely, September 13, 1955.

6. In the September term, 1955, only 21 days prior to the filing of this condemnation petition, namely, October 4, 1955, the condemnation petition was set for trial.

7. Plaintiff herein, being Respondent in said condemnation case, appeared without counsel being present to aid and assist him. The proceedings heretofore described and particularly the questions propounded to the prospective jurors is set forth in detail in Plaintiff's Exhibit I, which is attached hereto and made a part hereof.

8. The trial continued for the entire day of October 4, 1955, and on October 5, 1955, the jury reached a verdict, which verdict was in the sum of $1,200.00, and is so stated in the certificate filed in said cause. However, the transcript of testimony indicates that the certificate was amended by the jury foreman to read $1,200.00 per acre, making a total award of $6,000.00.

9. Karl Strech was and at all times and still is dissatisfied with said award an djudgment. Thereupon, he filed a Claim of Appeal to the Michigan Supreme Court, retaining therefor, an attorney who is now deceased, which file was Michigan Supreme Court No. 46, 770, the judgment

being affirmed in an opinion filed June 28, 1956, and reported in 346 Michigan 186.

10. Certain errors were urged on the appeal to the Michigan Supreme Court. Other facts and circumstances, some of which were not known to this Plaintiff, but about which Plaintiff verily believes were known to the officers, agents and attorney of the condemning authority and not revealed to the court, have since been discovered by this Plaintiff. This non-disclosure, combined with the other errors heretofore urged, have so aggrieved this plaintiff, that he feels a tremendous injustice has been wreaked upon to such an extent that he has been deprived of his property without due process of law, that the award and confirmation thereof are contrary to the equal protection of the laws, is not consistent with the constitutional mandate of condemnation only with just compensation, particularly because this condemnation jury was the judge of the law as well as of the facts; therefore, this award and confirmation thereof is totally null and void, unconscionable, and a fraud upon Plaintiff herein.

11. For the facts and reasons hereinafter enumerated, said award and judgment is null and void as being contrary to:

A. The United States Constitution, 14th Amendment, Section 1, which reads:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. The United States Constitution, 5th Amendment, which reads, in part:

"No person • • • shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

C. Michigan State Constitution of 1908:

1. Article II, Section 16, which reads:

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

2. Article XIII, Sections 1 and 2, which provide:

"Section 1. Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first terminated and just compensation therefore be first made or secured in such manner as shall be prescribed by law.

"Section 2. When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or be not less than three commissioners appointed by a court of record, as shall be prescribed: Provided, That the foregoing provision shall not be construed to apply to the action of commissioners of highways or road commissioners in the official discharge of their duties."

12. The condemnation proceedings were instituted pursuant to the School Code of 1955, Part II, Chapter 14, Sections 712 and 713, which reads as follows:

"Section 712. It shall be the duty of the circuit judge or circuit court commissioner, upon such application being made to him, to issue a summons or venire, directed to the sheriff or any constable of the county, commanding him to summon 18 freeholders residing in the vicinity of such site who are in nowise of kin to the owner of such real estate and not interested therein to appear before such judge or commissioner, at the time and place therein named, not less than 20 nor more than 50 days from the time of issuing such summons or venire, as a jury to ascertain and determine the just compensation to be made for the real estate required by such school district for such site, or for the enlargement thereof, and the necessity for using the same, and to notify the owner or occupant of such real estate, if he can be found in the county, of the time and place where such jury is summoned to appear, and the object for which such jury is summoned, which notice shall be served at least 10 days before the time specified in such summons or venire for the jury to appear as hereinbefore mentioned.

Section 713. Thirty days' previous notice of the time and the place where such jury will assemble shall be given by the board of such district, where the owner or owners of such real estate shall be unknown, nonresidents of the county, minors, insane or non compos mentis, or inmates of any prison, by publishing the same in a newspaper published in the county where such real estate is situated; or, if there be no newspaper published in such county, then in some newspaper published in the nearest county where a newspaper is published, once in each week for 4 successive weeks, which notice shall be signed by the board or by the secretary or treasurer of such district, and shall describe the real estate required for such site, or for the enlargement thereof, and state the time when and place where such jury will assemble; or such notice may be served on such owner personally, or by leaving a copy thereof at his last place of residence."

13. The above quoted Section 712 of the School Code of 1955 fails to establish guides or standards to the Sheriff directing him as to the method to be employed as to which 18 freeholders from among the many freeholders available for jury service, which he shall select. It is contrary to the statutory method of selecting jurors as used in other civil litigation. The failure to establish guides or standards itself is contrary to due process, and results in a lack of equal protection of the laws as specifically demonstrated by this very jury.

This provision is illegal, null and void because it states that the jurors must "reside in the vicinity of such site"; that jurors residing in the vicinity of said site cannot help but have a biased, prejudiced and pre-determined opinion of said condemnation petition, particularly when the residences of the jurors involved herein is set forth.

The Blissfield Community Schools District comprises the Village of Blissfield and four adjoining townships, namely, Blissfield, Palmyra, Ogden and Riga. It therefore would have a minimum of 144 square miles in area. However, all the jurors selected to try this condemnation petition resided within an area of two square miles, which included the school site and Plaintiff's five acres, which was the subject matter of the condemnation case.

14. The home of one of the jurors borders upon the school site. No street or road is between his home and the school. The school in effect, is located immediately to the read of Plaintiff's rear lot line fence.

Another juror at that time lived, and still does live, three doors South of the home of the attorney for the school district.

Another juror at that time lived, and still does live directly across the street from the home of the attorney for the school district.

Another juror at that time lived, and still does live directly across the street from the home of the superintendent of the Blissfield Community Schools District.

The superintendent of schools was the first witness in the condemnation case and was one of the key witnesses at said trial.

Every one of these five jurors above mentioned lived within four blocks of the five acres sought to be condemned.

Petitioner has made a thorough and complete investigation of these facts. It is unbelievable that these people could be fair or unbiased or have an objective view point on the issue of necessity and of value. Obviously, this public improvement would have a direct influence on the value of all these jurors' homes, particularly that home of the juror which is contiguous to the real estate which has become a part of the total school site.

15. The above quoted Section 712 of the School Code of 1955 also requires that the jurors not be interested therein. Another member of the jury was related to the wife of a land-owner who desired to, and did, sell his ten acres to the school district without condemnation proceedings. It is believed that his sale would not have been consummated unless Plaintiff's five acres were condemned.

16. It is believed that another member of the jury was the client of the attorney for the school district at the time of the condemnation trial.

17. Another member of the jury was at the time of the condemnation action, the Village Clerk for Blissfield. Another member of the jury was the wife of a member of

the Blissfield Village Council during the time that she served on the jury.

The sentiment in favor of the site being condemned was so high that any office holder, or relative thereof, would have felt an absolute necessity to vote in favor of condemnation.

18. Another juror lives only across the street from another piece of real estate owned by this respondent and Plaintiff herein. This juror several times attempted to purchase Plaintiff's real estate (not the subject matter of this litigation) but at no time has succeeded in doing so. It is believed thatthis juror was the instigator of a proceeding brought in the Lenawee Circuit several years ago against the present Plaintiff to have that real estate condemned by the State Fire Marshal as being unsafe and that the said proceedings resulted in a judgment favorable to Plaintiff herein.

19. The School code permits only challenges for cause and no peremptory challenges whatsoever are permitted.

20. The School Code, it is believed, in permitting challenges for cause, limits said challenges for cause as are specified in the statute to wit, Michigan Statutes Annotated, Section 27.264, being C. L. Mich. 1948, Section 602.139, which reads:

> "The court to which any person shall be returned as a juror, shall excuse such juror from serving at such court, whenever it shall appear:
>
> 1. That he is exempt from serving on juries by the provisions of the preceding section; or
>
> 2. That he is a justice of the peace, or executes any other civil office, the duties of which are, at the time, inconsistent with his attendance as a juror; or
>
> 3. When for any other reason, the interests of the public or of the individual juror, will be mate-

rially injured by such attendance, or his own health, or that of any member of his family requires his absence from such court."

21. Because this Plaintiff was not represented by counsel when he was respondent in said condemnation petition hearing, because of the short time between the service upon respondent and the date of hearing by this jury, because of the limitations forbiding challenges to the array, and further because no statutory challenges for cause for the reasons leading to the bias, prejudices and disqualifications of these members of this jury, and further because of the believed illegal method of selecting persons who were summoned to serve on this condemnation jury, which is the judge of law as well as of the facts, this plaintiff, verily believes that the entire condemnation proceedings were contrary to the provisions of the United States Constitution and the provisions of the Constitution of the State of Michigan as herein set forth in paragraph 11 of this Bill of Complaint.

22. The sum or value in controversy exceeds $6,000.00. Plaintiff has no adequate remedy at law.

Wherefore, Plaintiff prays this Honorable Court in Chancery to adjudge, order and decree that:

A. The condemnation award be decreed null and void and completely set aside;

B. The cloud upon the title of Plaintiff's real estate as hereinafore described in paragraph 3 of this Bill of Complaint be removed and held for nought, and that;

C. Plaintiff be decreed other further and proper relief.

/s/ Karl Strech.

/s/ Robert E. Childs,
Attorney for Plaintiff,
1926 Dime Building,
Detroit 26, Michigan.

State of Michigan,
County of Wayne—ss.

On this 10th day of March, 1958, before me, a notary public for the County of Wayne, personally appeared Karl Strech, who made oath that he has real the foregoing bill of complaint by him subscribed, and that the same is true of his own knowledge, except as to those matters and things therein stated to be upon information and belief, and as to those matters he believes it to be true.

/s/ Leonard Porthy,
Notary Public, Wayne County, Michigan.
My commission expires November 29, 1960.

SUBPOENAEING AND IMPANELING JURY

That there appears in the file of this cause a document entitled "Venire Facias" which has not been filed officially in the records of this cause, but which is a direction by the Circuit Judge under date of September 10, 1955, to the sheriff of Lenawee County, Michigan, to summon 18 freeholders according to the statutes in this case made and provided. That on said document is a certificate under date of September 19, 1955, whereby the sheriff of Lenawee County, Wade Willett, certifies that he personally "summoned each of the several persons therein named to appear at the time and place within mentioned."

That there appears in the files in this cause a "proof of service", filed October 4, 1955, and which is an affidavit of service signed and sworn to on the 4th day of October by the sheriff of Lenawee County, Michigan, alleging that he did summon Hazel Lauley, Buhrl Grinage, Ann Ingold, Joseph Buchmayer, Mrs. Carlton Lipp, Bill McDowell, Carl Haas, Florence Rost, Clayton Goble, John H. Creger, Clem-

ent Hoagland, Fayiz A. Kerbawy, Joseph A. Hart, Ronald Fritz, Phyllis Robertson, C. E. Newcomb, Duane DeLoach and Royal Raas, and "each of them, by mailing to each of them a summons by registered mail postage fully paid, with return receipt requested, directed to each of them at their respective last known postoffice address."

That said "Proof of Service" also states: "Return receipts were received from Hazel Lamley, Buhrl Grinage, Ann Ingold, Joseph Bachmayer, Mrs. Carlton Lipp, Bill McDowell, Carl Haas, Florence Rost, Clayton Goble, John H. Creger, Clement Hoaglund, Fayiz A. Kerbawy, Joseph A. Hart, Ronald Fritz, Phyllis Robertson, C. E. Newcomb, Duane DeLoach. Return receipt has not been received as yet from Royal Haas. The following persons were personally served by me: Edgar Cannane, Arthur Donaldson."

That attached to said "Proof of Service" appear return receipts mailed from Blissfield, Michigan, under date of September 28, 1955, returnable to A. B. O'Mara. That on said return receipt cards, dates of delivery vary from September 27th through September 29th, with almost all of said return receipts showing date of delivery as September 28th, 1955.

That at the convening of court on October 4, 1955, at 9:30 a. m., the following proceedings were had: Petitioner appeared by its attorney, Aloysius B. O'Mara, and defendant appeared in proper. After ascertaining that all were present, the court proceeded to call the list of jurors summoned, and in part the following took place:

The Court: Mrs. Carlton Lipp?

Juror Lipp: Here.

The Court: I have Mrs. It sound's like a man's voice.

Juror Lipp: It was from me, sir.

The Court: Would you bring your summons up here so I can see it?

(Thereupon the juror did as directed.)

The Court (continuing): Carlton Lipp. We would amend the service to show it was served on you. Do you have the original order drawn by the sheriff's department?

Mr. O'Mara: Well, the only thing, your Honor, the sheriff's department did was to call me by 'phone and give me the names of the jurors that I was to contact.. He didn't send me any written communication or document.

The Court: I see. You didn't have the original list of jurors. I wonder if you would call the sheriff's office.

Deputy Sheriff: Yes, sir.

The Court (continuing): Call over there, find out if it is Mrs. or Carlton Lipp shown on the original list. We will proceed to call the roll. Bill McDowell—

(Later on the following report was made to the Circuit Judge):

Deputy Sheriff: Judge, the Undersheriff is out for about ten minutes. I left word as soon as he somes back he would call you. He has the list.

(Thereupon and shortly thereafter, the jury was sworn in for voir dire examination of three prospective jurors who were excused because they were not freeholders, the following questions were asked of the prospective jurors):

Mr. O'Mara: Thank you very much, your Honor. In order to save time for the Court as well as the jurors I would like to ask a question if there are any jurors here this morning who are not freeholders. That is, who do not own real estate or an interest in real estate, and if so, would you please rise?

(Thereupon prospective jurors Bill McDowell, Ronald Fritz and Duane DeLoach arose.)

Mr. O'Mara: May it please the Court, I would ask that these three gentlemen be excused from jury since they do

not comply with the requirements of the statute in this case that the jury be composed of freeholders.

The Court: I will have to find out who there gentlemen are.

Mr. O'Mara: This gentleman is Mr. Bill McDowell.

The Court: Do your own no real estate in Lenawee County?

Juror McDowell: No real estate in Lenawee County.

The Court: You will be excused for cause.

Juror DeLoach: DeLoach.

The Court: Mr. DeLoach, you own real estate?

Juror DeLoach: I do not.

The Court: Either in your name or jointly with your wife?

Juror DeLoach: That's right.

The Court: You may be excused for cause.

Juror Fritz: Ronald Fritz.

The Court: Mr. Fritz, you own no real estate either in your own name or joint with someone else?

Juror Fritz: I do not.

The Court: You may be excused for cause.

Mr. O'Mara: The next question I would like to ask the jury is whether or not any member of this panel is related by blood in any manner whatsoever to either one of the respondents in this matter, Karl Strech or Mr. Berry, and if so, please rise.

(No audible response.)

Mr. O'Mara: My next question I would like to ask: Has any member of this panel an interest in any manner whatsoever in the litigation that is about to occur this morning relative to condemnation of the parcel that's to be acquired by the school district, and if so, will they please rise?

(No audible response.)

Mr. O'Mara: Is there any member of this panel who for any reason whatsoever is not able to make an objective decision relative to the question of necessity and the question of value, the two questions which will be preferred in this hearing?

(No audible response.)

Mr. O'Mara: That's all the questions I have.

The Court: Are any members of the jury panel on the school board in this district?

(No audible response.)

That thereafter the respondent advised the court in regard to Juror Goble, that he is a nice fellow but I know he leans on the other side. I got nothing against him personally, but I know I just won't get anywhere with Mr. Goble. It was determined by the court that Mr. Goble was not related to either of the defendants, and that he knew of no reason why he couldn't fairly and impartially try the matter as a juror. Then the court asked the following question:

The Court: Do you come in here with a mind so made up you couldn't be persuaded by the evidence as to which is right or wrong?

Juror Goble: No, sir.

The Court: You will not be excused under the statute then.

(Later on the following occurred):

The Court: Do you have any other challenges for cause in the panel that is presently been sworn to answer questions correctly?

Respondent Streets: I don't know what to say.

The Court: You should say, I don't know the answer. If you have any other challenges you should make them now. If you have not, you should say so.

Respondent Streeh: Well, If I say so after a while, your Honor, you would say, "Well, he agreed to it." I am not agreeing on selling my five acres.

The Court: That's not the question. The question now is whether or not you want to have any of these other jurors excused, because they are disqualified under the statute.

Respondent Streeh: All right, then, no use of saying Goble?

The Court: No, I can't excuse him under the statute.

Respondent Streeh: All right, then no use saying anything more.

APPENDIX C

MOTION TO DISMISS

STATE OF MICHIGAN—In the Circuit Court for the County of Lenawee, In Chancery

Karl Streeh, Plaintiff, v. The Blissfield Community Schools District, Defendant.	}	No.

MOTION TO DISMISS

Comes now, Aloysius B. O'Mara, Attorney for the defendant in the above entitled cause and moves the Court to dismiss the Bill of Complaint heretofore filed for the reasons that all matters conained in said Bill of Complaint are res judicata:

1. In paragraph 4, of plaintiff's Bill of Complaint, the argument of an erroneous description is averred. This argument was presented in the lower court and in the Supreme Court on the previous hearing. The argument was meticulously answered by the Circuit Court. (Record 93-96.)

The Supreme Court, in the case of *Blissfied Community Schools District v. Streeh*, 346 Mich. 186 (1956), reviewed this question and concluded on uage 192:

> "The claim that the instant proceedings were void for the reason urged is not well-founded." (Pages 189-192.)

2. Plaintiff, in paragraph 4, of the Bill of Complaint, reiterated the argument concerning the manner and method of summoning the jurors. In the first case the Circuit Court, in his opinion, rejects the argument. (R. 90-93.)

The Supreme Court reviewed this defense and concluded on page 193:

> "It doubtless would have been better practice to have sent said notices from the sheriff's office and to have requested return receipts addressed accordingly, but it cannot be said that the method of procedure followed was open to attack in the absence of any showing, or any claim, of prejudice, fraud, or mistake. Other questions raised with reference to the jurors who heard the matter are without merit and do not require discussion." (Pages 192-193.)

3. In paragraph 5 plaintiff argues that service on the defendant, Karl Strech, was made less than thirty (30) days prior to the date of hearing. This argument was presented on the first hearing and the Circuit Judge, after extensive reviewing of the pleadings and the transcript, concluded on page 90 of the record:

> "The Court feels that he waived any possible defect in the service by so appearing and so proceeding. Certainly, any additional nine (9) days notice would not have changed the results or the manner of proceedings in any way." (R. 87-90.)

The Supreme Court was not impressed with this argument, but stated on page 196:

> "Other questions raised by counsel in oral argument, or in their briefs, have been considered but do not require discussion. We find no substantial basis in the record for appellant's claims of material and prejudicial defects and irregularities."

4. Plaintiff, in paragraph 7, asserts irregularities in the voir dire examination. The Circuit Judge, on pages 83 and 84 of the record, reviews this matter and concluded:

> "The failure of defendant to have counsel is not sufficient grounds for granting a new trial."

On page 85 of the record, the Circuit Judge reviewed the argument and concluded on page 96:

> "It is the conclusion of this Court that the jury was properly drawn. * * *"

The Supreme Court reviewed the defense of prejudicial argument in the opening statement and concluded on page 194:

> "The jurors were judges of the law as well as of the facts. The argument of counsel was not improper, and we think it highly improbable that any member of the jury could have been misled thereby."

Counsel for Karl Strech, in questions number 3 and 4 in Statement of Reasons and Grounds for Appeal and in appellant's brief, argued the propriety of the voir dire examination. This matter was not formally decided by the Supreme Court, but on page 196, the Court states:

> "Other questions raised by counsel in oral argument, or in their briefs, have been considered but do not require discussion."

5. Plaintiff infers an irregularity in the signing of the certificate of the jury. This matter was asserted by prior counsel in paragraph 12 of Statement of Reasons and Grounds for Appeal. (R. 116.) This matter was likewise orally argued before the Circuit Court on the motion and

supplemental petition and motion for a new trial. Circuit Judge Martin answered this contention in his opinion:

> "It cannot be shown by the record that any of the claimed defects in the proceedings or that all of the claimed defects in the claimed proceedings were, in any way, prejudicial to the defendant. If none of the defects had existed, it is apparent that the same results would have been arrived at by the jury." (R. 96.)

The Supreme Court reviewed this matter extensively and on page 195 concluded:

> "We think the remarks of the circuit judge were so clear and specific as to preclude the possibility of any error on the part of the juorsr, or any of them with reference to their acts in preparing and returning the certificate." (Pages 194-195.)

6. There is no showing, by affidavit or otherwise, that the Federal and State consttintional defenses and other new defenses or facts and circumstances now imposed, could not have been previously raised in the Circuit Court for the County of Lenawee or the Supreme Court of the State of Michigan by the exercise of diligence; plaintiff herein does not claim that any or all of the defenses now imposed were not previously known or that the instant School District, fraudulently or otherwise, prevented the plaintiff from making any or all of such defenses and it is averred that said complainant has heretofore waived such defenses and is now estopped to plead such defenses.

7. This matter was tried on its merits before a properly selected jury, who were the judges of the law and the facts, and a Court of Equity will not set aside a judgment in a Court of Law unless it is against substantial justice.

8. Karl Strech, pro persona in the Circuit Court and by counsel in the Circuit Court and the Supreme Court consistently and emphatically interposed objections which pre-

supposed the validity and constitutionality of School Code of 1955, Part II, Chapter 14, Section 711-724 inclusive, and in particular the portions of such Code relating to condemnation procedures and is now estopped to deny the validity or constitutionality of such School Code and in particular such condemnation procedures provided therein.

9. Plaintiff objects to the method and manner of the selection of the jury. This argument was introduced in the lower court and on appeal, to the Supreme Court. The Circuit Judge reviewed this argument and at page 85 of the record states:

> "On page 19 of the record the defendant stated flatly that he had no further challenges relative to the jury."

The Supreme Court, at page 193, rejected this argument by stating:

> "It is not shown however, that defendant was in any way prejudiced, and the jurors who received the notices appeared in court at the time appointed. * * * Other questions raised with reference to the any error on the part of the jurors, or any of them jurors who heard the matter are without merit and do not require discussion."

It is averred that Karl Strech appearing pro persona and by counsel in the Circuit Court and in the Supreme Court, at no time attacked the validity or constitutionality of the method or manner provided by Section 712 of the School Code of 1955 and the specific objections raised accept and affirm the deliberations of the jury as being valid and constitutional. The challenges on voir dire by Karl Strech, affirms his acceptance of such jury and he specifically stated that he did not have any objections to the jury as drawn. (R. 8.) Plaintiff has waived his rights to object to said jury and is estopped to deny the validity and con-

stitutionality of the law which prescribed the method for the selection of said jury.

10. Plaintiff asserts some purported, bias, prejudice, or predetermined opinion on the part of various jurors by virtue of their residence in the immediate vicinity of the school site, residences of members of the school board and residence of plaintiff's attorney. This objection, under a definite guise, was interposed previously (R. 57) and the Circuit Judge answered this objection in his opinion by stating:

> "The defendant's counsel on the hearing on the motion for a new trial admitted there was no prejudice on the part of the jury but did claim there were special interests and that one of the jurors was in some way related to the petitioner. The relationship is not shown in the record nor were any special interests on the part of any juror shown in the record."

The Circuit Judge continued by specifically refuting this allegation. (R. 84-85.) The Supreme Court was equally adamant in dismissing this objection. (Page 193.)

11. Plaintiff is guilty of laches. The Supreme Court of the State of Michigan affirmed the judgment of the Circuit Court on June 28, 1956. The Blissfield Community Schools District commenced construction of said consolidated high school on or about April 1957 and at the present date said construction is approximately three-quarters completed.

12. Plaintiff has an adequate remedy at law by an appropriate action at law by right of Writ of Review or otherwise.

13. He who seeks equity must do equity and plaintiff refused to negotiate on reasonable terms prior to the institution of legal action and as the Supreme Court stated

at page 190 he "took a hostile attitude toward the proceedings and toward the plaintiff". Karl Strech has maintained a quixotic and egocentric campaign of threats, vilification, and harassment of all parties connected with this litigation and anyone in the Blissfield Community sympathetic to the school board or construction of said consolidated school.

14. That the pleadings and papers, documents, record on appeal, briefs on appeal, opinions and judgments of the Circuit Court and the Supreme Court of the State of Michigan, on their face reveal that Karl Strech has no cause of action against the defendant and the Bill of Complaint should be dismissed.

Wherefore defendant prays that the Bill of Complaint be dismissed with prejudice and with costs most wrongfully sustained by said defendant.

Blissfied Community Schools District,
By Aloysius B. O'Mara,
Attorney for Defendant,
107 Jefferson,
Blissfield, Michigan.

Dated: April 18, 1958.

APPENDIX D

OPINION OF CIRCUIT JUDGE

STATE OF MICHIGAN—In the Circuit Court for the County of Lenawee, In Chancery

Karl Strech,
Plaintiff,
v.
The Blissfield Community Schools District,
Defendant.
No.

COURT'S OPINION

On October 5, 1955, a condemnation jury rendered a verdict in favor of the present defendant and against the plaintiff relative to five acres of the plaintiff's land. A judgment was entered therein. The present plaintiff appealed to the Michigan Supreme Court and the judgment was affirmed.

Plaintiff now files a bill in equity asking this Court to declare the condemnation award null and void and to remove it as a cloud on plaintiff's title.

Defendant moves to dismiss the bill on the grounds that all the matters have already been determined. Briefs of counsel have been filed after the motion was argued orally.

The Court must take judicial knowledge of some things in considering this motion. Such knowledge is taken of all the proceedings had in the original condemnation case, including the Circuit Court's detailed opinion, the questions

raised on appeal and the Supreme Court's disposition of the appeal. The Court further knows the present plaintiff has refused to accept the tender of money which the present defendant paid into the Clerk's office based on the jury's verdict. The Court has been informed and believes the defendant has already constructed a school building which is partially on the land in question.

Plaintiff's bill of complaint and his brief complain of many things, including: Errors in description, errors in summoning jurors, errors in setting the time for hearing, the failure of the present plaintiff to have counsel at the time of the condemnation hearing, errors in jurors' certificate, errors in selecting the jury any many others. All these errors were raised on the motion in the original case to set aside the verdict. They were ruled on by the Circuit Court and this ruling was emphatically upheld by the Michigan Supreme Court.

Certainly equity cannot now in a collateral proceeding upset an action approved by the Supreme Court. These alleged errors will not be considered.

Plaintiff further raises the question of the constitutionality of the condemnation statute under the Fifth and Fourteenth Amendments of the United States Constitution and Article Two, Section Sixteen, and Article Thirteen, Sections One and Two of the Michigan Constitution.

The brief filed by the plaintiff cites no cases or authorities to sustain plaintiff's contention in this regard.

Let us look at some of plaintiff's claims. Plaintiff says the jury "must reside in the vicinity of the site" and as such they cannot help but be prejudiced. Plaintiff says there is no established guide or standards for the sheriff to use in selecting the jurors. Plaintiff says he believes some of the jurors were prejudiced: One because he lived

next door to the site, one lived three doors from the school attorney, one lived across the street from such attorney, one was believed to be a client of the school attorney, one was the Village Clerk, one was a member of the Village Council, one lived across the street from another piece of land owned by the plaintiff. Plaintiff claims these things mean the whole procedure was unconstitutional.

Plaintiff alleges lack of constitutionality in the statute because no peremptory challenges are permitted.

Plaintiff alleges the challenges for cause were limited by Section 27.264, Michigan Statutes Annotated, being Compiled Laws of Michigan, 1948, Section 602.139.

The Court can see no reason why a condemnation statute is unconstitutional because the jurors are required to reside in the vicinity of the land. "Vicinity" is not necessarily limited to adjoining land—it can well cover a large segment of the local population.

At common law and under our statutes parties are guaranteed a right of trial by a jury summoned from the "vicinage". Sec. 31 Am. Jur., 11, Jury, Sections 5 and 6.

The statute does create guides and standards sufficient for the sheriff to select names of jurors. Section 712 of the School Code, being MSA Section 15.3712, provides the sheriff shall select "eighteen freeholders residing in the vicinity of such site who are no wise kin to the owner of such real estate and not interested therein * * *." The legislature can determine what special restrictions, if any, will be placed on the officer in selecting whom he shall summon as jurors. See 31 Am. Jur., 605, Eckrich v. St. Louis Transport Company, 176 Mo. 621, 75 SW 755; People v. Harding, 53 Michigan 48; Fay v. New York, 332 US 261, 91 Law Ed. 2043.

This does not prohibit either party from challenging for any of the usual grounds for excusal for cause known at common law. The Court did not attempt to bar either party from asserting such challenge.

The Court permitted plaintiff to question jurors and make challenges for cause. The challenges for cause were not limited to those suggested by the present plaintiff. Challenges for cause would have been honored for any challenges to any cause which might be used in the usual civil jury case. See MSA Section 15.3714, Section 714 School Code of 1955.

The present plaintiff attempted to exercise but one challenge. He is now foreclosed from questioning the prejudice of jurors by his failure to challenge for cause. The challenges being available, the proceedings do not unconstitutionally deprive plaintiff of his property without due process of law. The question of jury prejudice and interest was likewise raised in the motion for a new trial before the Circuit Court and in the appeal to the Supreme Court.

The plaintiff claims the statute is unconstitutional because it provides no peremptory challenges. Peremptory challenges were unknown in English common law and are purely creatures of statute. See 31 Am. Jur. 194, Jury, Section 231.

For the other arguments relative to the alleged unconstitutionality of the proceedings, the Court is impressed by the able brief of the present defendant citing many cases. The present plaintiff offers no case or authority in his behalf.

The Court includes his original opinion filed November 25, 1955, as a portion of the opinion in this matter, together with the decision of the Michigan Supreme Court quoted in 346 Michigan at 186.

The Court feels the present plaintiff had an adequate remedy at law because he had every opportunity to raise all the questions he presently raises at the time of his original appeal to the Michigan Supreme Court in the case cited supra. The statute is not unconstitutional. The questions raised have been decided by our court of last resort once. A circuit court in equity cannot now overturn a Michigan Supreme Court decision by declaring a judgment null and void when the judgment has been upheld by our highest court.

Motion to dismiss is granted. Public questions being involved, no costs will be taxed.

Rex B. Martin,
Circuit Judge.

Dated: November 14, 1958.

APPENDIX E

DECREE OF CIRCUIT COURT

STATE OF MICHIGAN—In the Circuit Court for the County of Lenawee, In Chancery.

Karl Strech, Plaintiff,

v.

The Blissfield Community Schools District, Defendant.

DECREE

(Filed December 29, 1958)

At a session of said Court held at the Court House in the City of Adrian, Lenawee County, Michigan, on the 10th day of December, A. D. 1958.

Present: Honorable Rex B. Martin, Circuit Judge.

The plaintiff having filed a bill in equity asking that a condemnation award be held null and void and the defendant having moved to dismiss the bill on the grounds that all matters therein contained had been previously determined and the parties being in Court with their respective attorneys and the Court having heard oral argument by counsel relative to said motion to dismiss and the briefs of counsel having been perused and given mature deliberation and being further fully advised in the premises and the Court having rendered a decision in favor of the defendant and against the plaintiff;

It is hereby ordered and adjudged that the motion to dismiss be and hereby is granted and that a public question being involved, no costs will be taxed.

(s) Rex B. Martin,
Circuit Judge.

Patricia J. Johnston,
Deputy Clerk.

APPENDIX F

OPINION OF MICHIGAN SUPREME COURT

STATE OF MICHIGAN—SUPREME COURT

Karl Strech,
Plaintiff and Appellant,
v.
The Blissfield Community Schools District,
Defendant and Appellee.

(Filed November 24, 1959)

Before the Entire Bench.

Kavanagh, J.

Plaintiff filed a bill of complaint in the circuit court for Lenawee county on March 11, 1958, seeking to set aside a condemnation award originally made in a law proceedings instituted in the Lenawee county circuit court on September 6, 1955, and subsequently tried on October 4 and 5, 1955. On the latter date the condemnation jury made its award. Motion for new trial was shortly thereafter filed and followed by an amended motion for a new trial. On denial of these motions an appeal was taken to the Michigan Supreme Court. On June 28, 1956, this Court filed its opinion affirming the condemnation award. This opinion is reported in 346 Mich. 186.*

In the present action plaintiff alleges that because of the interest, prejudice and bias of the jurors and because of

*Blissfield Schools v. Strech.

the peculiar method of selection, which interest, prejudice and bias first came to his attention after the time had expired for filing a petition for a rehearing in the Michigan Supreme Court, he was deprived of his land without due process as is required by the United States Constitution, Fifth and Fourteenth Amendments, and the Michigan Constitution (1908), Article 2, §16; that he was deprived of his land in a manner not contemplated by Article 13, §§1, 2, of the Michigan Constitution (1908) because the jury of 12 freeholders residing in the vicinity of such property was biased, prejudiced and chosen in a manner which was fraudulent and that the fraud was perpetrated upon him; that the bias, interest and prejudice of these 12 freeholders, who acted not only as jurors but also as judges of the law, were not known to him at the time of the commencement of the condemnation trial; at the time counsel filed a motion for new trial, or at the time the oral and written arguments were submitted to the Michigan Supreme Court, but were discovered by him subsequent to that time.

The school district filed its motion to dismiss the bill of complaint on April 19, 1958.

Defendant alleges Blissfield is a community of approximately 2,800 people and Strech, except for the period of time in service and while working in Detroit, was born, reared, educated and lived in the village. The facts claimed to be fraudulent would certainly be common knowledge to residents of this small village. If not, normal diligence in the preparation of trial would have disclosed them to Strech.

After oral and written arguments, on November 14, 1958, the circuit judge filed a written opinion granting the motion to dismiss. On December 29, 1958, the decree for the school district was filed. From this decree plaintiff appeals.

The opinion of the lower court indicates that the circuit judge made an extensive study of the allegations in the bill of complaint and the law applicable thereto. We think he reached the right conclusion.

[No questions are raised by the bill of complaint with respect to the bias, prejudice and disqualification of the jurors or errors in selecting the jurors that were not raised or passed upon by this Court or should have been raised or passed upon by this Court in the previous case.]

Res adjudicata applies not only to issues which were determined on their merits but also to matters which the parties had an opportunity to present for adjudication of the merits. Porth v. Cadillac Motor Car Co., 209 Mich 89; Thompson v. Doore, 269 Mich 466; McDannel v. Black, 27 Mich 305; Boyich v. J. A. Utley Co., 306 Mich 625.

Plaintiff attempts to rely upon the allegation that he has been defrauded. He seeks to set aside the previous award. No facts supporting such an allegation are found in the bill of complaint. The facts alleged, taken as true, do not constitute fraud. Fraud is not to be presumed.

The only questions that need consideration are the questions regarding the constitutionality of the condemnation statute. Plaintiff alleges lack of constitutionality in the statute because no peremptory challenges are permitted and the challenges for cause are limited by CL 1948, §602.-139 (Stat Ann 1957 Cum Supp §27.264). Standards as to disqualifications for cause are set up in the statute sufficiently to justify determination as to whether a proposed juror is in a position to enter a fair and just verdict. These meet all the requirements of the constitutional provisions. Peremptory challenges have never been held to be a requirement of due process. Peremptory challenges in civil causes were unknown to the English common law, but Justice Campbell defined the Michigan law when he stated:

> "Challenges for cause are necessary in all inquiries by jury, but peremptory challenges in other than criminal proceedings are confined to cases where the statutes have directly provided for them." *Matter of Convers*, 18 Mich 459, 468.

It is error to allow a peremptory challenge not authorized by statute. Eldridge v. Hubbell, 119 Mich 61.

The legislature has failed to provide for peremptory challenges under the act used in this particular condemnation proceedings. This it had a right to do. Due process of law under the constitutional provisions was more than met by the careful examination of the jurors by the circuit judge and by the insistence of the circuit judge in giving the plaintiff the right to dismiss jurors for cause.

The decree of the lower court is affirmed. Defendant-appellee may have costs.

APPENDIX G

APPLICATION FOR REHEARING

STATE OF MICHIGAN—SUPREME COURT

Appeal from the Circuit Court for the County of Lenawee
Honorable Rex B. Martin, Circuit Judge

Karl Strech, Petitioner-Appellant, v. Blissfield Community Schools District, Respondent-Appellee.	Cal. No. 48,066

APPLICATION FOR REHEARING

Now comes the above named petitioner-appellant, Karl Strech, and respectfully moves this Honorable Court to grant a re-hearing in the above cause for the following reasons:

1. Because apparently counsel failed to emphasize that the bias and prejudice of nine of the twelve members of the condemnation jury was so obvious that by exposing their proximity to the real estate sought to be condemned, and exposing their relationships as neighbors and as clients of the school district's attorney were circumstances the mere statement of which was sufficient to prove biases and prejudices against Karl Strech and created a prima facie right in chancery to set aside the condemnation award, particularly in conjunction with the peculiar method of their selection as judges-jurors.

2. Because counsel apparently failed to emphasize adequately that the burden of exposing to the Circuit Judge these biases and prejudices of nine of these twelve judges-jurors was on the condemning authority, the Blissfield Community School District, and its duly authorized representative, and that said burden should never have been placed on petitioner, Karl Strech particularly when the condemning authority and its representative had actual personal knowledge of this biases and prejudices and when Karl Strech, a layman, was acting in pro per. without legal counsel to assist him.

3. Because counsel for petitioner failed apparently to emphasize adequately that even had the biases and prejudices of nine of the twelve judges-jurors been presented to the Circuit Judge on the voir dire that these nine individuals would not have been excused because the condemnation procedure protects only the condemning authority and not the land owner, Karl Strech, thereby resulting in depriving Karl Strech of a federal constitutional right, namely, being deprived of his real estate without due process as required by the United States Constitution, the Fifth and Fourteenth amendment thereto and the Michigan Constitution of 1908, Article II, Section 16.

Wherefore, your petitioner prays that this Court will grant a rehearing on said cause.

/s/ Robert E. Childs,
Attorney for Petitioner-
Appellant,
2164 Penobscot Building,
Detroit 26, Michigan.

Dated: December 10, 1959.

APPENDIX H

ORDER DENYING PETITION FOR REHEARING

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 13th day of January in the year of our Lord one thousand nine hundred and sixty.

Present the Honorable, John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards Thomas M. Kavanagh, Theodore A. Souris, Associate Justices.

Karl Streeh,
v.
Blissfield School District. } 48,066

A motion for rehearing having been heretofore submitted herein, it is hereby denied, with costs to defendant.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said Court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 14th day of January in the year of our Lord one thousand nine hundred and sixty.

Donald F. Winters,
Clerk.

(Seal)